IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 155 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX
Versus
V.B.NARANIA & CO

Appearance:
1. INCOME TAX REFERENCE No. 155 of 1986
NOTICE SERVED for Petitioner No. 1
MR BB NAIK with MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 27/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred by the Income Tax

Appellate Tribunal for our decision in respect of assessment years 1978-79 to 1980-81 :-

"On the facts and in the circumstances of the case, whether the assessee can be said to have employed 10 or more workers in a manufacturing process carried on with the aid of power as provided under clause (iv) of sub-section (2) of Sec. 80HH and clause (iv) of sub-section (4) of Sec. 80 J of the Act ?"

2. The assessee carries on the business of manufacturing Carborandum. The assessee claimed deductions under Sections 80HH and 80J of the Income Tax Act, 1961 (hereinafter referred to as `the Act') on the ground that it had employed 10 or more persons in the manufacturing process. The Income-tax Officer, however, disallowed the claim on the ground that the assessee got certain processes done from outsiders on piece-meal basis and that the assessee had not provided regular employment to any person in its manufacturing process. The Assessing Officer observed that mere providing of job work to some persons cannot be said to be regular employment and accordingly the deduction was disallowed. The Appellate Assistant Commissioner confirmed the above order. The Asstt. Commissioner also stated that most of the works were done by outsiders on job work basis and they were paid as per the contract rates.

3. In the appeal at the instance of the assessee, the Tribunal accepted the case of the assessee, which was also pleaded before the Appellate Assistant Commissioner in the appeal memo, that the salary paid to the workers was debited in Trading and Manufacturing account in the account styled as `Majuri Pagar Kharch' and that the workers were doing work in the factory and whatever work that was down by them was measured and on the basis of the quantity of work done and rate, voucher was made and payment against that voucher was made to the workers. In para 3 of the judgment, the Tribunal again noted the clarification made on behalf of the assessee in the following terms :-

"Bringing to our notice the detailed account of workers' salary it was submitted that at no point of time the workers employed by the undertaking was less than 10. In fact, according to him, even the casual workers and employees of the contractor in case of a contract are also required to be considered. He fairly clarified

> that there was no time limit of the employment by the workers but he would work at the factory premises for various processes and payment would be made according to the number of processes or pieces completed but usually they would work during the regular hours for the whole day."

The Tribunal then applied the test to find out whether the contract was of service or the contract was for service. The Tribunal came to the conclusion that the assessee had employed 10 or more persons and was entitled to get the deductions under Sections 80HH and 80J of the Act.

At the instance of the revenue, the Tribunal has, therefore, referred the above quoted question for our decision.

4. Mr BB Naik, learned Standing Counsel for the revenue has submitted that when the work was done by outsiders and on job work basis, they could never be considered to be the workers or employees and that, therefore, the Tribunal was not justified in overruling the view taken by the Assessing Officer and the Appellate Assistant Commissioner.

5. Though served, none appears for the respondent-assessee.

6. Having heard the learned counsel for the revenue, we are unable to accept the submission made by the learned counsel. It is true that the Tribunal has not expressly overruled in so many words the finding of the Assessing Officer and the Appellate Assistant Commissioner that the work was got done by outsiders, but on the basis of the material on record the Tribunal has thought it fit to accept the case of the assessee that the workers were working at the factory premises for various processes. Acceptance of such case of the assessee obviously means that the Tribunal did not confirm the finding given by the Appellate Assistant Commissioner that the work was done by outsiders. The Appellate Assistant Commissioner as well as the Assessing Officer merely stated that the work was being done by outsiders without clarifying whether the work was being done outside the factory premises. It appears from the tenor of the order of the Appellate Assistant Commissioner that because the workers were being paid on job work basis and not on the basis of wages payable for a fixed number of hours, such workers were considered to be outsiders i.e. outside the regular employment. The

Appellate Assistant Commissioner or the Assessing Officer did not specifically state that, according to them, the concerned persons doing the work were working outside the factory premises of the assessee. In this set of circumstances, when the Tribunal accepted the case of the assessee that the work was being done within the factory premises, there is no warrant for accepting the submission made by the learned counsel for the revenue that the work was being physically done outside the factory premises.

7. The learned counsel for the revenue, however, persisted that even if the work was being done within the factory premises, since the payment was being made on job work basis or piece rate basis, the persons doing the work would not be considered as employees.

8. The contention cannot be accepted. As held by the Apex Court in Harish Chandra Bajpai vs. Triloki Singh, AIR 1957 SC 444, a contract of employment may be in respect of either piece-work or time-work. The real test for deciding whether the contract is one of employment is to find out whether the agreement is for the personal labour of the person engaged, and if that is so, the contract is one of employment whether the work is time-work or piece-work, or whether the employee did the whole of the work himself or whether he obtained the assistance of other persons also for the work.

9. The Tribunal applied the correct test and came to the conclusion that the persons doing the work were employed by the assessee because the assessee was controlling not only the work to be done by those persons but also the manner of doing the work. Hence, the Assessing Officer and the Appellate Assistant Commissioner were not right in holding that the concerned persons were not employees because they were being paid on piece-rate basis or job work basis. As held by the Apex Court whether the person is an employee or not is a question of fact. The Tribunal having applied the correct test and thereafter having rendered the aforesaid finding that the assessee had employed 10 or more persons in the manufacturing process, we are of the view that the Tribunal was right in holding that the assessee had employed 10 or more workers in a manufacturing process carried on with the aid of power as provided under clause (v) of sub-section (2) of Section 80HH and clause (iv) of sub-section (4) of Section 80J of the Act.

10. We accordingly answer the question in the affirmative i.e. in favour of the assessee and against

the revenue.

The reference accordingly stands disposed of with no order as to costs.

(M.S. Shah, J.) (D.A. Mehta, J.)

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